No. 2946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re MAH SHEE, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.
Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

JOHN W. PRESTON,
United States Attorney,
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.

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BRIEF OF APPELLEE.

STATEMENT OF THE CASE

The appellant in this case applied for admission at San Francisco to enter the United States as the wife of Chung Leung on August 16, 1916. The alleged husband was denied admission at San Francisco in July, 1898, but was finally admitted under habeas corpus proceedings in December, 1914. He applied for a pre-investigation of status and was granted a Native's Return Certificate, form 430. He then went to China and claims to have married the appellant while there on the 14th day of January, 1916.

There is nothing unusual in this case as it comes before the above entitled Court upon the same pro-

ceedings as the ordinary habeas corpus case. After the Secretary of Labor had refused to land said appellant, a petition for writ of habeas corpus was filed in the District Court and to this petition the Government interposed a demurrer. At the time of hearing the demurrer was agreed that the records of the Bureau of Immigration, which composed all of the testimony taken in the case, be admitted in evidence and considered a part of the petition for the writ of habeas corpus upon the hearing of the demurrer. It was further stipulated between the parties hereto that these original records be considered in their original form in determining this appeal and said records are now on file and marked "Exhibits A and B".

POINTS URGED ON BEHALF OF APPELLANT.

1. That the evidence presented was of such a conclusive character that it was an abuse of discretion to refuse to be guided thereby.

2. That the hearing was unfair in that the right of counsel was so curtailed as to negative its value to the alien, and deprive her of the right to submit evidence and properly defend herself.

ARGUMENT.

It can readily be seen from the points urged on behalf of appellant that the same position is taken by counsel in this case that is taken in practically every case coming before this Court, namely: that

there was an abuse of discretion on the part of the Immigration officials and that said officials were unfair and deprived the appellant or applicant of certain rights to which she was entitled; but in order to refute this contention the Government takes the position at this time that the record in this case shows in a conclusive manner that there was no unfairness on the part of the Immigration officials and that the discrepancies which appeared in the testimony introduced and considered in determining this case were amply sufficient to justify the findings of the Immigration officials and the order of the Secretary of Labor.

As stated in the brief of counsel representing appellant, there was a favorable report filed by Inspector Warner who investigated this case, and in this connection the Government desires to call attention to the fact that it is frequently the case that an Inspector will report favorably and yet his report will not be followed by the other investigating officers, and there is ample reason for this rule.

In this particular case, Inspector Warner evidently did not give serious consideration to the material discrepancies which appeared in the testimony of the applicant and the alleged husband. A review of these discrepancies will show conclusively that such was the case. From the memorandum for the use of the Commissioner, which was prepared by the law officers of the Immigration Department,

will appear the seriousness of said discrepancies. They are as follows:

> "The applicant was accompanied by her alleged husband at the time she arrived at this port on the 16th inst., it being claimed that she was married to the latter in January, 1916. There is every indication that the alleged husband intended, when he departed from the United States in December, 1914, to fraudulently effect the admission of a woman to this country as his wife.
>
> In connection with his application for a native's return certificate, he stated, on December 9, 1914 (12017/-4614) that his wife was 'still living' at that time, but the following day he filed a letter saying that she died about the 11th month of the preceding year (November-December, 1913). While the present applicant agrees with the last-mentioned date of death of her alleged husband's former wife, the alleged husband now states that she died in the 7th month of CR 2. The death of this woman is obviously fictitious, as it is incredible that any person could mistakenly testify that his wife was living, and the succeeding day offer testimony diametrically opposite.
>
> The alleged husband, in the present case, first testified that he sent the applicant to Hong Kong to get married and that he did not marry her in his village through fear of pirates; that his father sent him a letter to Hong Kong saying that the applicant would be sent to the latter city for the purpose of marriage; and that she 'came all the way, chair and all, by

boat' and that a maid escorted her from her village to Hong Kong. The applicant states that she removed from her native village to Hong Kong at the age of five or six and lived in the latter City until her marriage. Upon recall the alleged husband testified—four days after his previous statement—that the applicant lived in Hong Kong at the time of the marriage, and sought to account for his previous testimony by stating that he might have been mistaken, all information having been received by him from the go-between.

The alleged husband, on his first hearing, stated that his father was then living in the home village (Nom Moon), which statement is confirmed by his above-mentioned assertion to the effect that he had sent a letter to the alleged husband 'in Hong Kong', and the alleged husband's further testimony that his father came to Hong Kong a few days after the marriage and stayed three or four days, renting a room adjoining his. After the applicant testified that her father-in-law had resided continuously with them in Hong Kong and was present at the marriage in that City, the alleged husband confirmed the latter statement, but offered no explanation of his previous testimony.

The alleged husband stated that his wife's mother 'lives' in the Sheung village; and that she visited him in Hong Kong, remaining about two nights, at which time he went out and slept with friends. After testifying that her mother lived in Hong Kong—the address being given—the applicant stated that her mother visited her after marriage but never remained over night,

and that her alleged husband never slept away from the house over night, this latter statement being amended on re-examination by the qualification that he visited his home village after the wedding on several occasions, remaining over night.

The alleged husband testified that the applicant made one trip to her home village after marriage, returning the second day, and that it takes six hours by boat to make the trip from said village to Hong Kong; but upon recall he stated that she did not remain over night, asserting that 'maybe he was mistaken' on the first examination, the applicant having testified that she made the trip in question but did not remain over night.

The above glaring contradictions were removed by the amended statement of the alleged husband, but the testimony is so very unconvincing as to be unworthy of belief; and there is ample authority for its rejection. In deciding the appeal of Fong Sam (printed decision No. 11) the Department referred to the case of *Ellwood* vs. *Telegraph Company* (45 N. Y. 549), in which the following language was used:

> 'It is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a fact, and are uncontradicted, their testimony should be credited, and have the effect of overcoming a mere presumption. * * * But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of

> credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. * * *.'

And in the case of *Prentis* vs. *Seu Leung* (203 Fed. 25), the Court said:

> 'We are of the opinion that this first examination was a part of the hearing contemplated by the statue, and that the Secretary was at liberty to so treat it, *even to the extent of disbelieving the second and more deliberate statement.'*

It is impossible to set forth in greater detail the character of the testimony offered in this case, but a perusal of the same would, it is believed, confirm my opinion that it is wholly false. I therefore recommend that the applicant be denied admission.

(Signed) W. H. WILLIAMSON,
WHW/ASH Law Officer."

The Government fails to see wherein the appellant gets any satisfaction out of the case of *United States* vs. *Sing Tuck, et als,* 194 U. S. 161, for the only point determined in this case was that an appeal would not lie until the detained had exhausted his remedies by taking an appeal to the Secretary of Labor following an adverse decision by the Commissioner of Immigration. The Court in this case, covering the point just referred to, said as follows:

> "An appeal is provided by the statute. The first mode of attacking his decision is by taking the appeal. If the appeal fails it then is time enough to consider whether upon a petition

> showing reasonable cause there ought to be a further trial upon habeas corpus. * * * But before the Court can be called upon the preliminary sifting process provided by the statutes must be gone through with. Whether after that a further trial may be had we do not decide."

Nor does the Government see wherein appellant receives any comfort from the case of *Woey Hoy* vs. *United States,* 109 Fed. 888, as it was stated in this case on page 891, as follows:

> "It is true that in all the Chinese cases this Court has been enabled, and takes pains, to point out the unreasonable, improbable and unsatisfactory points in the testimony which justified the trial court in disbelieving it. This delay, however, rests with the trial courts, and, in a certain sense, may be said to be optional with them. If no reasons are given for their action, this fact does not of itself furnish a sufficient ground to justify a reversal. Error must affirmatively appear. This court cannot assume that the court below acted arbitrarily in refusing to believe the testimony of any witness."

The Government concedes every legal proposition set forth by appellant on pages 4, 5 and 6. It is of course a well established rule of law that a court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. The Government never

took the position that a court or the Immigration officers ever had any such power, and certainly does not desire to take that stand at this time. Nor does the Government question the position of the appellant that there must be some supporting evidence to sustain a rejection by the Immigration authorities; but in this particular case it is difficult to understand why these propositions were cited by appellant's counsel as a review of the record, which includes the testimony and all of the proceedings covering the investigation of appellant, will show very clearly that the decision of the Secretary of Labor was based upon evidence and that there was ample evidence to support both the Secretary of Labor and the ruling of Judge Dooling.

In the second point cited by appellant herein, counsel takes the position that the wife should not be held incommunicado, but on the other hand should have the privilege of associating with her husband. The Court can readily see, however, wherein the whole object of the Immigration laws might be defeated if this were the case. For instance, if the husband in this case were permitted to communicate with his wife, it would be a very easy matter for them to clear up any discrepancies which might appear in their testimony.

An examination of the record in this case will show that every right was accorded appellant to which she was entitled. She had an opportunity to examine all of the evidence interposed in the

case. She also had an opportunity to present any evidence that she desired to present in order to meet the testimony taken by the Immigration officers.

On page 53 of Exhibit "A" there is a receipt showing that counsel reviewed the evidence introduced in this csae, and in this connection the Government desires to call attention to the fact that the report of the Immigration officials upon the testimony is no part of the record to which appellant or her counsel are entitled to review. These are merely confidential matters of the Immigration Bureau and are based wholly upon the evidence presented before the report is made. If applicants were permitted to examine this report and then have the privilege of clearing up the discrepancies, there would seldom be a case where the discrepancies could not be explained, for the circumstances are always such that some explanation might be offered for any discrepancy that might appear, and this explanation could very easily be framed by witnesses after consulting together, without any respect for the truth of the matters covering the explanation. In other words, if witnesses were permitted to consult with each other and have the opportunity of clearing a discrepancy, these discrepancies might always be explained without any regard for the truth.

In this case a reopening as ordered and additional ex parte affidavits were taken and considered by the Immigration Bureau. In fact, appellant was

given every opportunity to present her case in the most favorable light, but it will be noted on pages 70 and 71 of Exhibit "A", the same being the original record of the Bureau of Immigration, that the Immigration Bureau was well satisfied that the discrepancies which appeared in the testimony were fatal to a favorable decision to appellant and it was for these reasons that her application was denied.

Assistant Secretary Louis F. Post, on page 71 of Exhibit "A", in supplementing the memorandum of the Assistant Secretary, found on page 70, after the case had been reopened and further ex parte affidavits considered, stated as follows:

> "Since Bureau memorandum of October 26th was prepared, counsel has submitted a brief, now attached to the record, and has argued the case orally.
>
> It is not necessary to go over the several points again. The argument made orally added nothing to that contained in the brief, and neither is at all convincing. In the main, the explanations which have been attempted do not explain. Clearly, beyond any question whatsoever, this applicant has failed to sustain the burden of proof placed upon her by the Statute, and the decision of the Commissioner at San Francisco should be affirmed.
>
> (Signed) ALFRED HAMPTON,
> Acting Commissioner-General.
>
> APPROVED:
> (Signed) LOUIS F. POST,
> Assistant Secretary."

As stated in this brief, the appellant was given an opportunity to see all of the evidence taken in her case and she had ample opportunity to meet and refute it by evidence presented in her behalf. This is all that the law requires.

Low Wah Suey vs. *Backus,* 225 U. S. 460.

The above case also emphasizes the point of law that unless there is unfairness or an abuse of discretion, the proceedings of the Bureau of Immigration are not open to attack and the findings of the Secretary of Labor are final and conclusive.

Ekiu vs. *U. S.,* 142 U. S. 651,

Japanese Immigrant Case, 189 U. S. p. 86,

Zakonaite vs. *Wolf,* 226 U. S. 272.

From the very nature of an investigation of this character, the hearing of the Executive officers must be of a summary character.

Chin Yow vs. *U. S.,* 208 U. S. 8.

and the hearings may be conducted upon affidavits or ex parte depositions.

Ekiu vs. *U. S.,* 142 U. S. 651,

Low Wah Suey vs. *Backus,* 225 U. S. 460.

In conclusion, the Government again desires to call attention to the fact that an investigation of the original record of the Bureau of Immigration, Exhibit "A" on file herein, will show beyond question that the evidence was sufficient to justify the refusal on the part of the Secretary of Labor to

admit appellant into this country as the wife of a citizen and that the judgment of Judge Dooling should be sustained.

Respectfully submitted,

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